STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

JOSEPH E. WHITE,

Plaintiff,

vs. Case No. 2005-2848-NO

LANDQUEST PROPERTIES, INC., a Michigan corporation, and MILLSTONE POND, L.L.C., a Michigan limited liability company, jointly and severally,

Defendants.
_____/

OPINION AND ORDER

Defendant Millstone Pond, L.L.C. has filed a motion for summary disposition.[1]

Plaintiff filed this complaint on July 18, 2005. Plaintiff alleges that he was an invitee in a mobile home park owned by defendants. Plaintiff claims that, on January 2, 2003, he walked into the street at the foot of his driveway and slipped on snow-covered ice. Plaintiff asserts that he suffered serious injuries as a result of his fall, and claims that these injuries were caused by defendants' failures, inter alia, to adequately maintain the premises, keep the premises in reasonable repair, and maintain the common areas in a manner ensuring their fitness for their intended purposes. Therefore, plaintiff instituted the present action seeking damages for his injuries.

Defendant Millstone brings its motion for summary disposition under MCR 2.116(C)(8) and (C)(10). Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party "has failed to state a claim on which relief can be granted." *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). All factual allegations are accepted as true,

as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992); *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of the plaintiff's claim. *Outdoor Advertising v Korth*, 238 Mich App 664, 667; 607 NW2d 729 (1999). A motion under MCR 2.116(C)(10) must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b). The adverse party may not rest upon mere allegations or denials of a pleading, but must, by affidavits or other appropriate means, set forth specific facts to show that there is a genuine issue for trial. MCR 2.116(G)(4). The court must consider all this supporting and opposing material. MCR 2.116(G)(5). *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 7; 614 NW2d 169 (2000). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

In support of its motion for summary disposition, defendant Millstone argues that the danger posed by snow-covered ice was open and obvious, without any special aspects rendering it unreasonably dangerous. Millstone also claims that there is no evidence that there was any defect in the premises under which it could be held liable pursuant to MCL 544.139. Finally, Millstone asserts that even if the Court applied MCL 544.139, there is no genuine issue of fact as to whether it breached any statutory duty it owed thereunder.

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[1] Defendant Landquest Properties was dismissed from this case, without prejudice, on September 7, 2005.

In response, plaintiff claims that the "open and obvious" doctrine is inapplicable. Plaintiff claims that Millstone "has admitted that the unnatural accumulation of ice . . . developed due to the design and drainage of its lots." Plaintiff further claims that all cases in which an individual falls on snow-covered ice are not open and obvious as a matter of law, and asserts that the ice which plaintiff slipped on was not open and obvious. Lastly, plaintiff urges that the issue of whether defendant's actions were reasonable is a question of fact for the jury.

A danger is "open and obvious" if an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Novotney v Burger King (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). The risk of falling on snow or ice is generally recognized as open and obvious as a matter of law. See *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002). Moreover, even when snow obscures ice, so long as a reasonable person of ordinary intelligence would be able to discover the condition and the risk it presents, the condition is open and obvious. *Teufel v Watkins*, 267 Mich App 425, 429; 705 NW2d 164 (2005). Finally, it is well established that open and obvious accumulations of snow and ice do not necessarily feature any special aspects. See *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332-333; 683 NW2d 573 (2004).

Under certain circumstances, the open and obvious doctrine is inapplicable when an injury occurs in the common area of a residential rental property. MCL 554.139 provides that, "[i]n every lease or license of residential premises, the lessor or licensor covenants . . . [t]hat the premises and all common areas are fit for the uses intended by the parties," and covenants to "keep the premises in reasonable repair during the term of the lease or license." Sidewalks located within an apartment complex are "common areas" within the meaning of MCL 554.139.

Benton v Dart Properties Inc, ___ Mich App ___; ___ NW2d ___ (Docket No. 256465, Dec'd March 28, 2006). A landlord must take reasonable measures to ensure that sidewalks are fit for their intended use, and a sidewalk covered with ice is not fit for its intended purpose. *Id.* Therefore, a landlord may owe a duty of care regardless of the openness or obviousness of icy sidewalk conditions. *Id.*

In the case at bar, the Court is satisfied that the icy conditions under the newly fallen snow were open and obvious. Accepting for purposes of this motion that plaintiff was subjectively unaware that ice had accumulated under the freshly fallen snow, the Court nevertheless notes that whether a danger is open and obvious is determined objectively. Plaintiff acknowledges that the temperature on the day of the underlying incident was conducive to ice forming. Defendant Millstone's Exhibit B, Deposition of Joseph E. White at 29, 42. He acknowledges that he had observed ice on the street on previous occasions. *Id.* at 33. Plaintiff had lived in Michigan for fifteen years, and testified that the weather on the day in question was "a typical snowy winter day" in Michigan. *Id.* at 30-31. Therefore, the Court is satisfied that, insofar as defendant Millstone did not breach any statutory duties under MCL 544.139, plaintiff's cause of action is precluded pursuant to the open and obvious doctrine.

Pursuant to MCL 544.139, defendant Millstone had a duty to keep common areas fit for their usual purposes and keep premises in reasonable repair, regardless of whether a danger is open and obvious. However, the Court is satisfied that there is no genuine issue of material fact as to whether the premises were kept in reasonable repair. The deposition testimony and other documentary evidence submitted by the parties belies plaintiff's contention that Millstone "has admitted that the unnatural accumulation of ice . . . developed due to the design and drainage of its lots." To the contrary, the deposition testimony which plaintiff cites simply indicates that

"water from the backs of those houses comes through those two yards and runs down the gutter to the drain . . . [b]ecause it cannot run uphill behind the houses." Plaintiff's Exhibit 4, Deposition of David J. Chynoweth at 30. Therefore, the only support for plaintiff's contention that a faulty drainage design led to an unnatural accumulation of ice is plaintiff's attorney's questioning during the deposition, over objection, that "there's three reasons that ice would develop here." *Id.* In short, the only documentary evidence which plaintiff has provided supports the unremarkable proposition that the design of the lots causes water to flow into a gutter, which in turn leads to a drain.

On the other hand, defendant Millstone provides the Court with three Michigan Department of Environmental Quality inspection reports indicating that the drainage in plaintiff's neighborhood was in compliance with state code. See Defendant's Exhibits E, F and G, DEQ Manufactured Housing Community Annual Inspection Reports. In fact, one of these reports indicates that the sewage system is "very well maintained." See Exhibit F, *supra*.

Having carefully reviewed the documentary evidence presented, the Court is satisfied that there is no genuine issue of material fact as to whether defendant Millstone kept the premises in reasonable repair pursuant to MCL 544.139. Therefore, the Court finds that summary disposition of plaintiff's complaint is appropriate, to the extent that liability is premised on Millstone's alleged failure to maintain the premises in reasonable repair.

Next, the case which plaintiff cites in support of his argument, that defendants' negligence rendered the street unfit for its intended purpose, is clearly distinguishable from the case at bar. In *Benton*, *supra*, the plaintiff slipped and fell on snow-covered ice which had accumulated on a common sidewalk within an apartment complex. Some time had apparently elapsed between the formation of the ice and plaintiff's eventual fall. In fact, during the course

of a twelve-hour day, the defendant in that case had only salted the sidewalks once. The Court of Appeals determined that the reasonableness of defendant's actions in maintaining the sidewalks in a condition fit for their intended purpose was a question of fact for the jury.

In the present case, however, plaintiff admits that the snow stopped "[r]ight around 8 o'clock when [he] went out to shovel." Defendant Millstone's Exhibit B, Deposition of Joseph E. White at 28. In fact, plaintiff's deposition testimony suggests that he purposely attempted to shovel early and shovel the "end of [his] driveway" so that "when the snowplow did come through, [he] would have a smaller pile at the end of [his] driveway." *Id.* at 27. Nothing presented to this Court suggests that defendant Millstone negligently failed to plow or salt plaintiff's street within a reasonable time. Therefore, unlike the situation in *Benton*, there is no genuine issue of material fact as to whether defendant Millstone's maintained the street in a manner fit for its intended purpose.

Since summary disposition may be appropriately granted pursuant to MCR 2.116(C)(10), the Court need not address defendant Millstone's motion for summary disposition under MCR 2.116(C)(8).

For the reasons set forth above, defendant Millstone Pond's motion for summary disposition is GRANTED, and plaintiff's complaint is DISMISSED. Pursuant to MCR 2.302(A)(3), this Opinion and Order resolves the last pending claim and closes this case.

IT IS SO ORDERED.

DIANE M. DRUZINSKI
CIRCUIT JUDGE

Diane M. Druzinski, Circuit Court Judge

Date: JUN 19 2006

DMD/aac

JUN 19 2006
A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY: COURT CLERK

cc: David J. Elkin, Esq.
Andrew J. Paluda, Esq.